In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 194

LOCAL UNION NO. 12, UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.[1]

No. 212

LOCAL 1367, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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[1] The Business League of Gadsen, Alabama, the charging party before the Board, and the eight employees on whose behalf the charge was filed, were permitted to intervene in the court of appeals. Thus, the League and the eight employees are parties to this proceeding.

In both cases, the Board found that the union, which was the exclusive representative of the employees involved, violated its duty of fair representation imposed by the National Labor Relations Act by discriminating against certain employees because of their race, and that such breach of that duty constituted an unfair labor practice under Section 8(b)(1)(A), (2) and (3) of the Act. 150 NLRB 312; 148 NLRB 897.[2] In each case, the court of appeals sustained the Board's unfair labor practice findings, and enforced its order. 368 F. 2d 12; 368 F. 2d 1010 (Pet. No. 194, pp. 17-41; Pet. No. 212, pp. 17-18).[3]

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[2] In the *Local 12* case, the Board found that the union had refused to process grievances for negro employees whom it represented with respect to (1) backpay allegedly due them as a result of past seniority practices which accorded a preference to white employees, and (2) the desegregation of plant restrooms, showers, and dining rooms, and the plant golf course. In the *Local 1367* case, the Board found that Local 1367 (which has only white members) and Local 1368 (which has only Negro members) were the joint representatives of the longshoremen in certain Texas ports, and that Local 1367, together with the District Council, maintained and enforced an agreement which resulted in alloting 75 percent of the longshore work to the white members of Local 1367 and only 25 percent to the Negro members of Local 1368.

[3] The court first decided *Local 12*, and then upheld the Board in *Local 1367* on the authority of its *Local 12* decision. In *Local 12* the court, holding that a union's breach of the duty of fair representation constituted an unfair labor practice under Section 8(b)(1)(A), found it unnecessary to "consider the Board's additional contentions that such conduct also violated Sections 8(b)(2) and 8(b)(3)" (Pet. No. 194, p. 41). If certiorari is granted, we reserve the right to defend the Board's orders on these grounds as well as the one adopted

We submit that the court of appeals correctly upheld the Board's conclusion that a union commits an unfair labor practice by breaching its duty of fair representation. That decision accords with the recent decision of the Court of Appeals for the District of Columbia Circuit in *Truck Drivers, Local 568* v. *National Labor Relations Board (Red Ball Motor Freight, Inc.)*, May 18, 1967, 65 LRRM 2309. It does not conflict with *National Labor Relations Board* v. *Miranda Fuel Co.*, 326 F. 2d 172 (C.A. 2), since although the court there declined to enforce the Board's order, only one judge decided the fair representation issue.

The question whether a union's breach of its duty of fair representation constitutes an unfair labor practice under the National Labor Relations Act, however, is of substantial importance, both in the administration of the Act and in the conduct of labor-management relations generally. The problem has been the subject of extensive comment in the law reviews and other journals (see Pet., No. 194, pp. 30-31, n. 11). And only recently, in *Vaca* v. *Sipes*, 386 U.S. 171, 186, this Court assumed, for purposes of deciding the preemption issue there presented, that breach of the duty of fair representation was an unfair labor practice. In these circumstances, a final resolution of the question by this Court is warranted.

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by the court of appeals. The petition in No. 212 (see p. 3) specifically raises the other grounds.

Accordingly, the Board does not oppose the granting of the petitions in these cases.

Respectfully submitted.

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